
GARDEN COURT
CHAMBERS

Community Care Law Update:

Age assessments

Emma Fitzsimons, Garden Court Chambers

25 January 2024

Why age matters

R (ECPAT UK) v Kent CC and SSHD [2023] EWHC 1953 (Admin) per Chamberlain J at [1]:

"Ensuring the safety and welfare of children with no adult to look after them is among the most fundamental duties of any civilised state. In the United Kingdom, this duty is imposed on local authorities. They discharge it in a variety of ways, depending on the needs of the child concerned, for example, by placing children with foster parents or in registered children's homes or other appropriate accommodation under the supervision of a social worker. The common feature of these arrangements is that the children are, to use the statutory term, "looked after", and not simply given a roof over their head. A detailed legislative regime requires the local authority, as "corporate parent", to assess each child's social, educational and health needs and make plans to meet them."

Vulnerabilities of displaced children

R (ECPAT UK) v Kent CC and SSHD [2023] EWHC 1953 (Admin) per Chamberlain J at [2]:

"In recent years, large numbers of unaccompanied children have arrived in the UK and claimed asylum, most having crossed the Channel in small boats. They are referred to as unaccompanied asylum-seeking children or, as the parties have called them, "UASC". Acronyms can be helpful, but they can also divert the reader's attention from something important. I shall refer to these children as "UAS children". All have travelled long distances. Some have been abused or mistreated in their country of origin or on their journey here. Some are victims of human trafficking. Many speak little or no English and are ill-equipped to navigate life as an asylum-seeker in the UK. As a cohort, they are especially vulnerable."

Children's Commissioner concerns – 19 October 2023

Concerns about Age Assessment

Many of the measures in the Illegal Migration Act will make it harder than ever to keep children safe from further exploitation and harm. However, while many protections for children will be watered down by the Act, it does still acknowledge the need for children to be treated in a different way.

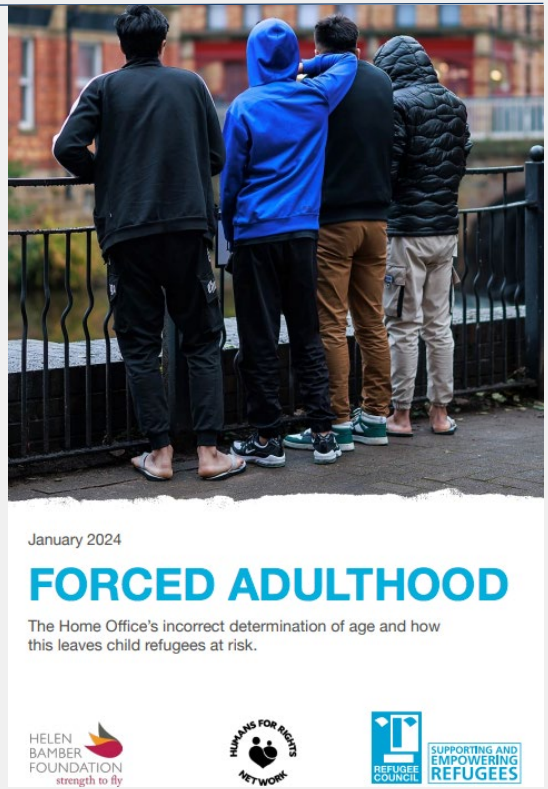
That is why it is essential that no child is wrongly categorised as an adult, and that age assessment is carried out in a safe and robust way. As we know from the latest available statistics, the majority of those who claim to be children and whose age is disputed are in fact shown to be children on further assessment. It is of course also vital that adults are not wrongly categorised as children, as this could also carry safeguarding risks.

I am extremely concerned about the way age assessments are currently conducted when children first arrive – they happen very quickly, and are not carried out by trained social workers as a full and thorough assessment (known as a 'Merton compliant assessment') would be. I have met children, living alone in hotels with adults, where a rushed assessment has somehow concluded they are an adult.

HBF, HRN and Refugee Council Report – January 2024

'Child refugees who come to the UK alone are facing harassment, abuse and criminalisation as a result of being **wrongly treated as adults** and **placed in accommodation with adult strangers:**

- Over an 18-month period, **at least 1,300 children were wrongly assessed to be adults by the Home Office**
- In the first half of 2023, **nearly 500 children were placed in adult accommodation or detention**
- Figures were obtained through FOIs from local authorities, as **the Government refuses to publish data** on these children
- **Adult settings pose significant risks to children in the asylum system** due to the lack of safeguards
- Charities warn of **dangers of exploitation and abuse** of vulnerable children.'



Overview for today

- Impact of flawed historic age assessment on discretionary powers of LA
- Procedural fairness challenges
- Scientific methods
- Human rights challenges

Impact of flawed assessment on discretionary powers of LA

R (HP) v Greenwich RLBC [2023] EWHC 744 (Admin)

- Fordham J considering discretion power of LA to provide support services to a young adult who as a consequence of the LA's historically flawed "child in need" assessment is denied duties owed to a "former relevant child" – see *GE Eritrea* [2014] PTSR 854 at [17]
- HP wrongly age assessed as 20 by LA – before Upper Tribunal succeeded in being 19 with a DOB of 1 January 2002 [2]
- HP asked LA to exercise its Discretionary Power favourably in his case – refused to do so [2].
- UT reached its conclusion on age with "markedly different and fuller" evidence [6].
- Detailed discussion of the Discretionary Power at [23] with three observations observations from Fordham J at [24]:
  - *Aggravated injustice* – decision maker needs to think about what aggravates e.g. unreasonable or irrational is more serious injustice as less excusable; one which is blameworthy or culpable is even less excusable; did the individual make a prompt challenge; did they seek interim relief?
  - *Sole justifiable outcome* – may be the aggravated injustice, or needs of the individual, discretion must be exercised reasonably
  - *What is now at stake?* – where are we now; services sought and needs are relevant.

R (HP) v Greenwich RLBC [2023] EWHC 744 (Admin)

- Fordham J did not accept on facts that this was a 'sole justifiable outcome' case – the age assessment was flawed as it was wrong on the objective standard; UT Judge did not conclude breach of fairness or reasonableness; UT Judge did not find fault or blame with the social workers; not a case of "aggravated" injustice. The needs of HP were not so overwhelmingly powerful that there is only one outcome on discretion [26i-ii]
- Fordham J also rejected the Claimant's argument that before an adverse decision is taken, fair procedure and reasonable inquiry requires an 'equivalent needs assessment re CA 1989. The CA 1989 as a statutory scheme identifies triggers for assessment re duties – no such duty arises here [29]
- But –LA must take reasonable steps so as to take into account now known needs as a relevant consideration [33]
- Claim succeeded on 'now known needs' issue because the evidence from the LA did not suggest that the social workers had in fact taken into account the new evidence arising out of the age assessment proceedings – rather they had been aware of his circumstances from the Social Services file in Sept 2019. LA had to make a decision afresh [45-48]

Procedural fairness challenges

R (SB) v Kensington and Chelsea RLBC [2023] EWCA Civ 924

- LA successfully appealed a JR concluding the AA was unlawful
- CA proceeded to hear academic appeal because it raised an issue of law of general importance [5, 78-82]
- High Court held:
    - (1) *Lack of interpreter was a significant short falling* – on its own may not be fatal, but here no Appropriate Adult and absent a sufficient 'minded to' [41]
    - (2) *Appropriate adult* could have played a role in avoiding misunderstandings about SB's answers which were then used as a basis for disbelief [42]
    - (3) *Minded to process* – three answers which were considered dishonest could be explained as misunderstandings if an interpreter and appropriate adult present – on their own may not be enough but cumulatively unfair [43]
    - Conclusion? – No fair process – quashed the AA decision [44]

R (SB) v Kensington and Chelsea RLBC [2023] EWCA Civ 924

- Laing LJ concluded on the practice issue re: "hiving off" procedural challenges from substance [85-86]:
  - *AB v Kent, HAM* – decided procedural fairness in isolation from the substantive question of age, which is precedent fact (*A v Croydon)*
  - Parties and Court should consider if overriding objective is best furthered by hiving off procedural challenge from a decision on the merits, deciding the procedural challenge in the Administrative Court and then the transferring consideration of merits to UT.
  - Two reasons not to hive off:
    - Outcome on merits may well make the decision on procedural challenge unnecessary.
    - May be artificial and unhelpful for the court to consider a procedural without also confronting the merits at the same time.
  - In future cases, Administrative Court should expressly consider whether there is, in each case, a good reason to hive off procedural challenge: such a decision is likely to add costs, delay to litigation and no evident benefit.
  - Once permission granted, norm should be to transferred to the UT, for it to consider procedural challenge impact on merits.
  - Decision of High Court quashed because of the "paradox" in approach [88-93]

Scientific methods

Immigration (Age Assessment) Regulations 2024

- Made on 9 January 2024, came into force on 10 January 2024.
- SSHD makes the Regs pursuant to section 52(1) and (2)(a) of NABA 2022
- Preamble to the Regs states SSHD has sought scientific advice re: methods for assessing age in accordance with section 52(3) of NABA 2022.
- Link: https://www.legislation.gov.uk/uksi/2024/19/made#:~:text=These%20Regulations%20make%20provision%20specifying,51%20of%20the%20Nationality%20and

Explanatory Notes to NABA 2022 provisions re justification

"…Assessing someone's age in the absence of documentary evidence is ***a highly challenging task.*** *Local authorities regularly report difficulties in handling cases that involve age disputes. As the courts have recognised, even comprehensive and thorough holistic age assessment can carry a significant margin of error. Similarly, there have been cases where assessments have been conducted on the same individual by different social workers, which have led to very different conclusions.*

The use of scientific methods offers the opportunity for more informed decision-making around an age disputed person's age. The United Kingdom is one of few countries in Europe that does not routinely make use of scientific methods of age assessment. Many other European countries make use of a variety of scientific techniques to assist in making decisions on age. It is the Government's intention to fully explore the options available. *The Secretary is creating new powers through this clause:*

- ***a power to make regulations concerning the use of scientific methods of age assessment; and***
- ***a power for a decision-maker to take a negative credibility inference from a refusal to comply with a request to undergo a scientific age assessment without good reason.***

Regulation 2 of 2024 Regs

2. Specified scientific methods for use in age assessments

The scientific methods specified under section 52 of the 2022 Act for the purposes of age assessments under section 50 or 51 of the 2022 Act are—

(a) the interpretation of radiographs to assess the stage of maturation of the mandibular third molars;

(b) the interpretation of radiographs to assess the stage of maturation of the bones of the hand and wrist;

(c) the interpretation of images from magnetic resonance imaging to assess the stage of maturation of the distal femur and proximal tibia;

(d) the interpretation of images from magnetic resonance imaging to assess the stage of maturation of the medial end of the clavicle.

Human Rights challenges

TK v Greece (App No 16112/20)

- Handed down 18 January 2024 – Official chamber judgment only available in French .
- TK arrived on Samos in October 2019, wrongly classed as an adult. Provided official documentation form Sierra Leone. Correction of his date of birth took over 15 months, and during that time he lived in an unsafe makeshift camp. Greek authorities relied on COVID-19 as reason for delays in asylum procedure.
- ECtHR found wrong registration of the Applicant as an adult and the failure to correct his age in due time violated his Article 8 ECHR rights:
  - *24. In these circumstances, the Court concludes that the authorities failed to exercise the required diligence, in so far as it concerns the procedural guarantees relating to the determination of age, in particular providing for the appointment of a guardian and , consequently, they did not comply with the positive obligation to protect the applicant in his capacity as an unaccompanied minor seeking international protection (Darboe and Camara, cited above, §§ 153-154 and Diakitè, cited above, §22) .*
- Living conditions amounted to inhumane and degrading treatment in violation of Article 3.
- TK awarded 10,000 Euro as non-pecuniary damage.

Thank you

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Community Care Law Update

Sections 17 and 20 of the Children Act 1989

Tessa Buchanan

Garden Court Chambers

25 January 2024

Statutory provisions

Section 17 Children Act 1989: the duty

- Imposes a *"**general duty**"* on LAs to (a) **safeguard and promote the welfare of children within their area who are in need** and (b) so far as is consistent with that duty, **promote the upbringing of such children by their families by providing a range and level of services** appropriate to those children's needs: s17(1) CA 1989.
- Although a *"general duty"*, **LAs must act so as to promote the object of the statute** and a refusal to provide services needed will be subject to *"strict and, it may be, sceptical scrutiny"*: *R (VC) v Newcastle CC* [2011] EWHC 2673 (Admin).
- Assistance may be provided to the **family** of a child in need, may include **accommodation**, **assistance in kind**, and/or **cash**, and may be **unconditional or subject to conditions** as to repayment: s17(3), (6), and (7) CA 1989.
- **LAs must assess the needs of a child** in their area who appears to be in need: *R (G) v Barnet LVX* [2003] UKHL 57 at §77, applying s17 together with Sch 2, para 3 CA 1989.

Section 17 Children Act 1989: children in need

- A child is in need if:
  - He or she is **unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him or her of services** by an LA under Part 3 CA 1989;
  - **His or her health or development is likely to be significantly impaired or further impaired without the provision of such services**; or
  - He or she is **disabled**, defined as being *"blind"*, being *"deaf or dumb"*, suffering from *"mental disorder of any kind"*, or being *"substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed"*.

  S17(10) and (11) CA 1989

Section 20 Children Act 1989

- LAs must provide accommodation for **any child in need in their area** who appears to them to **require accommodation as a result of** there being **no person who has parental responsibility** for him or her; his or her being **lost or abandoned**; or the **person who has been caring for him or her being prevented from providing suitable accommodation or care**: s20(1).
- **LAs must provide accommodation for any child in need in their area who is 16 or over** and whose **welfare** the LA consider is likely to be **seriously prejudiced** if they don't provide accommodation: s20(3).
- The LA must ascertain and give due consideration to the **child's wishes and feelings**: s20(6) CA 1989.
- An LA **may not provide accommodation if the child is under 16 and a person with parental responsibility objects** and is willing and able to provide accommodation: s20(7) CA 1989. It is **unlikely to be reasonable to force a capacitous and fully-advised child to accept accommodation under s20 CA 1989** against his or her will: *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14.

Unaccompanied asylum-seeking children

R (ECPAT UK) v (1) Kent CC (2) SSHD [2023] EWHC 1953 (Admin)

- Three linked cases: (1) *ECPAT v Kent CC and SSHD*; (2) *Brighton & Hove CC v SSHD*; and (3) *Kent CC v SSHD*.

- Facts:

  - KCC announced it would no longer accept newly-arriving UASC into its care due to pressure on its resources (although it continued to accept other children).
  - In September 2021, KCC and SSHD agreed the Kent Protocol. KCC agreed to accept a capped number of UASC into its care, pending their transfer to other LAs under the National Transfer Scheme for the transfer of social services functions between LAs.
  - SSHD commissioned hotels to accommodate UASC outside the care system pending their transfer under the National Transfer Scheme.

ECPAT v Kent CC and SSHD

- Held:
  - KCC's cap on the number of UASC it would accept into care was unlawful. The duty under s20 CA 1989 is absolute, non-derogable, applies irrespective of the authority's resources, and pertains to all children regardless of immigration status.
  - The Kent Protocol was unlawful because it formalised and endorsed an unlawful refusal to accept more UASC once the cap had been reached. Both KCC and SSHD had acted unlawfully in adopting this.
  - A transfer under s72 IA 2016 did not require the transferring LA to have been exercising functions but it did require the transferring LA to make arrangements for the transfer. Before such arrangements were made, the transferring LA must satisfy itself of the appropriateness of the transfer on a case-by-case basis. SSHD had acted unlawfully by arranging transfers other than in accordance with arrangements made between LAs.

ECPAT v Kent CC and SSHD

- Held:
  - SSHD has power to direct LAs to comply with the transfer scheme generally, rather than in an individual case, and could enforce that by bringing judicial review proceedings.
  - SSHD had power to accommodate UASC under common law or under s3(5) CA 1989. However, the power could only be used over very short periods of time in true emergency situations, where stringent efforts were being made to enable LA to resume its duties. The SSHD had exceeded that limit and therefore her provision of hotel accommodation for UASC was unlawful.

- Relief ([2023] EWHC 2199 (Admin) and [2023] EWHC 3030 (Admin) at §§3-5):
  - Kent Protocol quashed.
  - NTS Protocol quashed in so far as it permitted SSHD to arrange transfer of responsibility for UASC without participation of transferring LA.
  - Mandatory order granted requiring SSHD to take all possible steps to transfer UASC in hotels into care of LA by 22 September 2023 and any UASC placed subsequently in hotels into care of LA within 5 working days.

R (Kent CC) v SSHD [2023] EWHC 3030 (Admin)

- KCC alleged that SSHD had acted and was acting unlawfully in the design and operation of the NTS.

- Held:
  - Design and/or operation of NTS was not contrary to the *Padfield* principle. That principle had no application where the public body was "trying but failing" to achieve the statutory purpose, which was the position here.
  - SSHD was not acting inconsistently with terms of NTS Protocol.
  - There was no breach of s55 of the Borders, Citizenship and Immigration Act 2009. Decision-makers thought what they were doing was sufficient to safeguard and promote the welfare of children.
  - SSHD's decision-making had not had the effect of frustrating discharge of KCC's s20 CA 1989 duties.

Kent CC v SSHD

- Held (continued):
  - SSHD's decision-making in relation to NTS was unlawful between December 2021 and 27 July 2023 because (and in so far as) it failed to have regard to fact that (1) SSHD was partly responsible (through her agreement to the Kent Protocol) for KCC's breach of its s20 CA 1989 duties and (2) SSHD's use of hotels for UASC had become systematic and routine by December 2021 and therefore unlawful.
  - SSHD's decision-making between 27 July and 10 October 2023 could not be called irrational given that SSHD and KCC were in negotiations to agree arrangements for KCC to take more UASC and those arrangements would have bearing on what changes to NTS were required. In addition, SSHD was entitled to consider whether to commence relevant provisions of Illegal Migration Act 2023.
  - However, once arrangements had been agreed, and if those provisions were not commenced, SSHD would be required to formulate rational plan for operation of NTS capable of permanently eliminating use of hotels for UASC.

See also…

- *R (Medway Council) v SSHD* [2023] EWHC 377 (Admin): claim for judicial review of a direction from the SSHD requiring Medway to participate in the National Transfer Scheme was dismissed.
  - The words *"unduly prejudice"* in s72(4) IA 2016 imply that there is a "due" level of prejudice which may be acceptable and confer an evaluative discretion on the SSHD.
  - It was not irrational or unlawful for the SSHD to adopt a policy under which exemption from the NTS was confined to councils in a state of crisis amounting to a complete breakdown.
  - The test had been properly applied in Medway's case.

- *Article 39 v SSHD* [2023] EWHC 1398 (Fam): application for the Court to exercise its inherent jurisdiction to make wardship orders in respect of a number of UASC who had gone missing from hotel accommodation run by the SSHD was refused.
  - The inherent jurisdiction was very broad but could not be used where there were statutory powers in place that could do the same job.
  - The CA 1989 set out a comprehensive scheme for the protection of children in need. The difficulty in this case arose because the UASC were missing, not because of a lacuna in the statutory scheme.

Retrospective care leavers

R (TT) v Essex CC [2023] EWHC 826 (Admin)

- TT had a troubled childhood and became homeless aged 16. Following a meeting with an ECC social worker, she was provided with accommodation under the Essex Young People's Partnership. ECC stated that this accommodation was not available under s20 CA 1989.

- TT contended that this accommodation was provided under s20 CA 1989, and she had therefore become an eligible child. TT argued that ECC was not entitled to stipulate that EYPP accommodation is not available under s20.

- Held:
  - ECC was entitled to stipulate that EYPP accommodation was not available under s20 provided that TT was given a meaningful alternative choice of s20 accommodation elsewhere. TT was given that choice.
  - In accepting the EYPP placement, TT had agreed not to be accommodated under s20 CA 1989.

TT v Essex CC

- Further:
  - A homeless child can agree to be accommodated other than under s20. For the purposes of reaching such an agreement, the LA must present the alternatives neutrally and impartially; must not apply spin or undue pressure; and ideally should record the alternatives in a clear memorandum which the child can take away and consider.
  - There is a "potential problem" whereby there is often insufficient time for a child to be advised about s20 in sufficient detail before having to decide whether to accept accommodation. This can be resolved by a "fair, purposive reading down of the legislation" which allows a child to be accommodated in a placement which has "entirely neutral" legal effect.
  - The starting point with anonymity orders should always be that they have an end date.

R (BC) v Surrey CC [2023] EWHC 3209 (Admin)

- BC applied as homeless to the local housing authority in September 2019, stating he had been asked to leave by his mother. He was referred to SCC social services.

- BC brought judicial review proceedings asserting that the s20 CA 1989 duty had arisen and actions taken thereafter by SCC had been taken under s20 CA 1989 and as a result he was now owed leaving care duties. In the alternative, SCC should exercise its discretion to treat him as being owed such duties.

- Held:
  - SCC had owed BC a duty under s20 CA 1989 by 18 September 2019.
  - The arrangements made by SCC for BC to stay with his friend's mother on and after 17 October 2019 were made pursuant to s20 CA 1989.
  - BC therefore had the status of a qualifying child.
  - The argument that permission should be refused by reason of delay was rejected. The case was concerned with an ongoing breach. In any event, there was good reason for any delay.

R (DF) v Essex CC [2023] EWHC 3330 (Admin)

- DF's mother, with whom she had been living, died in August 2022. ECC assessed DF as being a child in need but did not provide accommodation.

- DF challenged ECC's failure to recognise that it owed her a duty under s20 CA 1989 and its failure, after she turned 18, to treat her as a former relevant child under s23c CA 1989.

- Held:
  - After the notice to quit served by her mother's landlord expired, DF had been homeless for purposes of s175 Housing Act 1996. This did not necessarily mean she required accommodation under s20 CA 1989: it would depend on the facts. However, the fact that DF was homeless under s175 Housing Act 1996 was potentially relevant to that question. ECC had not considered this, but that did not vitiate its decision.

DF v Essex CC

- Held:
  - DF had not been provided with inaccurate information about the options available under s20 CA 1989 when she was advised she could not be accommodated under s20 with her partner and her cats. ECC was not required to secure unregulated accommodation for DF and her partner in order to comply with s20.
  - DF did not refuse accommodation under s20 CA 1989. This would require a clear refusal which did not happen.
  - ECC's decision that DF did not require accommodation was reasonable and lawful. The risk of DF being evicted was minimal.
  - ECC's decision not to exercise discretion to treat DF as former relevant child was lawful. There had been no material error of law by ECC in respect of the s20 decision. There was a narrow residual discretion to treat DF as a FRC even in the absence of an error of law but refusal to exercise this discretion was not irrational.

Provision of support under s17

R (ODN) v Merton LBC [2023] EWHC 3254

- ODN had complex needs. She brought a claim for judicial review asserting that Merton had failed to provide adequate care and support to meet her needs under s17 CA 1989 and/or s2 of the Chronically Sick and Disabled Persons Act 1970. She sought interim relief, requiring Merton to provide waking-night care for 7 nights per week.

- Application for interim relief granted in part:
  - There was a serious issue to be tried. Merton's analysis of ODN's needs did not engage with ODN's points, and there was no reasoned basis for its conclusion that AA needed no further help pending a full assessment. There was also a serious issue as to the rationality of Merton's reliance on the availability of respite care in the absence of any reasoned assessment of the suitability of that care.
  - The balance of convenience was complicated by the parties' failure to have commissioned an ISW report, as directed, and by the fact that a further assessment was underway. However, it lay in favour of providing some further interim support until those assessments were completed.
  - Merton was ordered to provide overnight care for 20 nights per month (an increase from 8).

Placement of 16- and 17-year-old children

Supported Accommodation (England) Regulations 2023/416

- Reg 36 of the Supported Accommodation (England) Regs 2023 introduces a new reg 27C into the Care Planning, Placement and Case Review (England) Regs 2010, with effect from 28 October 2023. Pursuant to this, a LA can now only place a 16- or 17-year-old looked after child in accommodation *"in accordance with other arrangements"* under s22C(6)(d) CA 1989 where the accommodation is:
  - Supported accommodation provided by a supported accommodation undertaking, in respect of which a person is registered under Part 2 of the Care Standards Act 2000 (or where the transitional provisions of the Supported Accommodation (England) Regs 2023 apply); or
  - Excepted accommodation as defined in reg 27C(2) (includes care homes, hospitals, and various other institutional settings).

- Similar restrictions also introduced, in respect of relevant children by virtue of amendments to reg 9 of the Care Leavers (England) Regulations 2010, made by reg 37 of the Supported Accommodation (England) Regs 2023.

Thank you

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GARDEN COURT
CHAMBERS

Key education law cases

Of the last 12 months

Ollie Persey, Garden Court Chambers

What is the PSED? The general duty…

A public authority must, in the exercise of its functions, have due regard to the need to—

(a) **eliminate discrimination**, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) **advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it;

(c) **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it.

GP v Lime Trust, EHRC intervening [2023] UKUT 77 (AAC)

- Concerned the jurisdiction of the First-tier Tribunal (FTT) in disability discrimination claim to consider PSED-compliance as it related to *justification*.
- The UT found that section 113(1) read with section 156 was a jurisdictional bar and that only the Administrative Court in a claim for judicial review can determine a PSED breach.
- If the Administrative Court has made a finding of PSED breach, that might be a relevant factor for the FTT.
- Wider implications of the decision?

AI v London Borough of Lambeth and Secretary of State for Education [2023] EWHC 2088 (Admin)

- PSED compliance in discharging section 42 Children and Families Act 2014
- Transgender young person with an Education, Health and Care Plan ('EHCP')- placements had kept breaking down. On AI's case, misgendering had contributed to this.
- Para 92:

> *"In my judgement it is an unavoidable conclusion that in the present case, where the underlying statutory mechanism is designed to discharge a local authority's education, health and social duties to an individual based upon that individual's own particular personal needs and characteristics, including disabilities and diagnoses that render him the subject of particular protection and concern, and it has provided for them under that section it is impossible to argue that no due regard has been had under section 149 PSED in respect of that individual."*

TZA v A School [2023] EWHC 1722 (Admin)

- PSED compliance in a permanent exclusion of a disabled child of Black-Caribbean ethnicity
- JR focused on misapplication of the PSED and inadequacy of reasons in responding to the Independent Review Panel's recommendations for reconsideration. Court found at para. 49:

  > *"The reference to "written evidence that the requirements of the Equality Act had been considered by the Head prior to reaching her decision" indicates that the GDC may have been persuaded that it needed written evidence of the Headteacher's consideration of the PSED in order to conclude that she had indeed considered it. If it did then this was, for the reasons I have already explained, a misapprehension.* ***However, to the extent that this amounts to an error of law it can't have been a material one, as it was an error that tended to favour the Claimant's case."*** **(Emphasis added.)**

- This "*written evidence"* was an *ex post facto* assertion from the Headteacher recorded in the minutes of the subsequent GDC hearing that she *"had considered the requirements of the Equality Act 2010 and that [she] was confident that [TZB] had not been treated any less favourably than any other student"*.
- CF *R (ota MXK & others) v SSHD* [2023] EWHC 1271 at para. 84, where the court held that even though a written document is not required in all cases, where there is no such document "*it may be more difficult to show that the duty has been discharged "in substance" and "with rigour"?*

W, R (On the Application Of) v Hertfordshire County Council [2023] EWHC 3138 (Admin)

- Construction of Reg 20 SEND Regulations 2014.
- ASAP time limit to finalise an EHCP; and
- Outer limit is 20 weeks from the EHCNA request being made NOT date when LA agrees to undertake an assessment.
- Order from FTT – Reg 44(2)(b)(ii) SEND Regs- 14 weeks from FTT's order. LA didn't do this.
- FTT not alternative remedy

W, R (On the Application Of) v Hertfordshire County Council [2023] EWHC 3138 (Admin)

"27. In contrast to the pre-action protocol response letter, the Acknowledgement of Service filed in response to the Claimant's Judicial review claim said that the Local Authority intended to contest the whole of the claim. Paragraph 8.3.5 of the Administrative Court Guide to Judicial Review states:

"Defendants and interested parties must not oppose permission reflexively or unthinkingly. In appropriate cases, they can and should assist the Court by indicating in the Acknowledgment of Service that permission is not opposed"

28. It seems to me that this is precisely what the Local Authority was doing in this case. **It would have been far better if the Local Authority had accepted that it had not complied with its statutory obligations.** That ambiguous position was also reflected at paragraph 4.2 of the Summary Grounds of Resistance said:

"The Defendant has at all times acted with regard to the applicable terms of the Children and Families Act (2014) and the Special Educational Disability Regulations (2014), Protocol 1 (Article 2) of the European Convention on Human Rights and indeed any other applicable legislation/ regulations"

29. The duty on a public body is to act in accordance with its statutory obligations or, if it has not done so, to make this clear. It cannot be right that the response of a public body to a judicial review claim is to say that it has "times acted with regard to" its legal obligations when, in fact, it knows that it has acted in breach of those obligations. The lack of a candid position by the Local Authority is, to say the least, unfortunate and is not consistent with its duties to the court."

CWJ v Director of Legal Aid Casework & Lord Chancellor

- Challenge to the lack of Exceptional Case Funding for school exclusion appeals
- Lord Chancellor's Guidance when claim was issued:

  "A *decision of an Independent School Appeal Board to permanently exclude a pupil does not involve the determination of civil rights and obligations."* This cites *R (V) v The Independent Appeal Panel for Tom Hood School* [2010] EWCA Civ 142 ('*Tom Hood*')."
- Revised Lord Chancellor's Guidance (July 2023):

  "Proceedings before an Independent School Appeal Board in relation to the permanent exclusion of a pupil may involve the determination of civil rights and obligations, if on the particular facts the exclusion is an arguably disproportionate restriction on the right to an education under Article 2 Protocol 1 of the European Convention of Human Rights, and/or if such exclusion arguably gives rise to a right to a judicial remedy under the applicable law.

School Inclusion Project

- Next meeting (hybrid): School Inclusion Project: Policy Meeting | Events

| Garden Court Chambers | Leading Barristers located in London, UK

Wednesday 7 February 6-7.30pm